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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 527

JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company, *Petitioners*,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

MOTION TO VACATE FORTHWITH THE OPINION AND JUDGMENT BELOW, TO DEFER CONSIDERATION OF ALL PETITIONS FOR WRITS WITH RESPECT THERETO AND FOR OTHER RELIEF.

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January 10, 1952.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, John V. Farwell, III, Bolton Sullivan and Cary N. Weisiger, Jr., Directors of the Missouri Pacific Railroad Company, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit, entered August 14, 1951, affirming an order of the District Court for the Eastern Division, Eastern Judicial District of Missouri, which approved a plan of reorganization for the Missouri Pacific and other railroad companies, debtors, in a proceeding under Section 77 of the Bankruptcy Act.

OPINIONS BELOW.

The opinion of the Court of Appeals (RCA,[1] 14-36) is reported in 191 F. 2nd 265. The opinion of the District Court (R II, 915-45) is reported in 93 F. Supp. 832. The reports and order of the Interstate Commerce Commission (LII)[2] are reported in 275 I.C.C. 59 and 275 I.C.C. 203.

JURISDICTION.

The judgment of the Court of Appeals was entered August 14, 1951 (RCA, 37-40). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

However, the case involves a special jurisdictional problem under Section 208(a)(5) of the Bankruptcy Act (11 U.S.C., Section 208(a)(5)), which is the subject of the attached Motion to Vacate Forthwith the Opinion and Judgment Below, to Defer Consideration of All Petitions for Writs with Respect Thereto, and for Other Relief.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals had power or jurisdiction to approve the plan, after a petition under Section 208(a)(1) of the Bankruptcy Act had been filed and referred to the Commission, and after the provisions of Section 208(a)(5) had become operative.

2. Whether the Commission had power or authority, under Section 77(f) of the Bankruptcy Act, to require the involuntary consolidation of the Missouri Pacific and other

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[1] RCA refers to separately printed Record of Proceedings in the Court of Appeals.

[2] LII refers to separately printed Volume LII of Record, containing the Commission's Reports and Order setting forth the plan.

debtor railroads, without provision for compliance with Section 5(2) of the Interstate Commerce Act.[3]

3. Whether the plan provisions vesting control of these vast railroad properties in a handful of banks and insurance companies, having minor beneficial ownership, are legal and equitable under Section 77 and in accordance with public policy.

4. Whether the Commission and Courts, in disregarding the actual earning record and value of the properties, observed legal standards under Section 77, particularly Subsection (e).

5. Whether the cash provisions of the plan and the refusal to use cash to acquire debts at a discount accord with legal and equitable standards and policies under Sections 77 and 208 of the Bankruptcy Act.

6. Whether changed conditions have rendered the plan obsolete, inequitable and inconsistent with the standards and policies of Sections 77 and 208.

STATUTES INVOLVED.

The statutes involved are:

Section 208 of the Bankruptcy Act (11 U.S.C., Section 208), particularly Subsections (a)(1), (a)(5) and (b).

Section 5 of the Interstate Commerce Act (49 U.S.C., Section 5), particularly Subsection (2).

Section 77 of the Bankruptcy Act (11 U.S.C., Section 205), particularly Subsections (b), (e) and (f).

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[3] There is also a related question of equitable procedure and jurisdiction: Whether the rulings below were proper, holding that the District Court lacked jurisdiction to entertain a petition by the Independent Directors to declare the consolidation unlawful, to disentangle this naked underlying legal issue from the mass of complicated factual issues and to expedite its determination. (R. II, 1059-81, 1083-6, RCA, 36)

STATEMENT OF THE CASE.

This is a proceeding under Section 77 of the Bankruptcy Act for the reorganization of the Missouri Pacific Railroad Company, the New Orleans, Texas & Mexico Railway Company, the International-Great Northern Railroad Company (called the principal debtors, sometimes referred to respectively as the Missouri Pacific, NOTM and I-GN) and twenty-one other debtor railroads.

The petitioners (referred to as the Independent Directors) are directors of the Missouri Pacific. They or their predecessors have been elected through cumulative voting procedures (guaranteed under the laws of Missouri, where the Company is incorporated) at each of the Company's annual meetings over a period of eight years by the votes of holders of between approximately 20% and 25% of the shares of Missouri Pacific stock, common and preferred, voting at the meetings.[4]

Plans of reorganization approved by the I.C.C. in 1940 and 1944, respectively, were never confirmed or consummated. The 1940 plan was returned upon consent of the parties in light of changed conditions. The 1944 plan, again because of changed conditions, and upon the recommendation of the Commission itself, was returned by mandate of the Court of Appeals in September, 1947, for further investigation, consideration and recommendation.[5] The Commission thereupon ordered hearings to consider modifications of the 1944 plan and the proposal of other plans (R I, 2-4).

On October 24, 1947, the Commission granted the Independent Directors leave to intervene as parties. At the I.C.C. hearings, held March 23-26, 1948, they submitted and

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[4] Between 200,000 and 300,000 shares, common and preferred, have annually been voted for Independent Directors. E.g., see R II, 795-6.

[5] See mandate and District Court order, referred to at RCA, 45. For I.C.C. recommendation, see Exh. B attached to Exh. 1009 before I.C.C.

supported the Independent Directors Plan (Exh. 1009), providing basically for the separate reorganization of each of the principal debtors, while preserving the pre-bankruptcy intercorporate pattern, and providing for preliminary debt reductions and for substantial recognition of the present preferred and common stock of the Missouri Pacific. One of their key and consistent points of advocacy, in addition to separate reorganizations, has been to avoid drastic reorganizations and forfeitures by the use of large cash accumulations in the several estates to acquire at available discounts, and eliminate further interest accruals on, claims of bondholders that must be satisfied ahead of the stock.[6]

On the basis of the hearings held in March, 1948, the third attempted plan (the subject of the instant petition) was thereafter promulgated by the Commission in reports and orders dated August 2, and December 29, 1949 (LII). In fundamental approach and structure this plan is similar to its predecessors.

Hearings on objections to the plan and claims for equitable treatment, filed by the petitioners and other parties in interest, were held by the District Court March 27-April 1, 1950 (R II, 532-9, 560-914).[7] On July 29, 1950, the Court filed its opinion, and on October 3, 1950, entered its Findings, Conclusions and Order, approving the plan in all respects and overruling all objections and claims for equitable treatment (R II, 915-54).[8]

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[6] E.g., see R I, 335-6, 343-6, 350-2; R II, 532-9, 900-12, 1003-8.

[7] At the same time hearing was held on the Independent Directors' petition to declare the consolidation unlawful, for a separate hearing and order on this underlying issue and for other relief (R II, 564-5, 567-73, 760-3, 787-90, 793-815, 828-33, 872-6, 913-14).

[8] On the same dates, respectively, the District Court filed a memorandum opinion and order, dismissing the Independent Directors' petition, described in the preceding footnote, on the ground that "the Court has no jurisdiction to entertain said petition" (R II, 1083-6).

Upon appeals by the petitioners and other parties, the Court of Appeals for the Eighth Circuit heard oral argument on May 10, 1951.

With the appeals pending, several parties on July 13, 1951, filed in the District Court (where proceedings to confirm the plan had already been instituted) a petition under Section 208(a)(1) of the Bankruptcy Act, seeking a Commission hearing and report on changed conditions affecting the plan. The petition was duly referred to the I.C.C., which fixed September 15, 1951, as the date for filing replies.

Meanwhile, on August 14, 1951, the Court of Appeals issued its opinion and entered judgment, affirming the District Court's approval of the plan (RCA, 14-40).[9]

The plan provides basically that the debtor railroads and two non-debtor companies shall be consolidated or merged (LII, 28693). The proposed capitalization of the proposed consolidated company is set forth in Volume LII, pp. 28464, 28565; and the proposed distribution of cash and new securities in Appendices C and D thereof opposite p. 28636.

The plan wipes out the present common stock of the Missouri Pacific and provides only partial recognition of the claim of the preferred stock (LII, 28592-3, 28745, App. C and D opp. 28636).

Further discussion of these matters, as well as the methods employed in fashioning maximum capitalization figures, the control provisions, the cash provisions and other aspects of the plan, will appear in the following parts of this petition.

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[9] The Court of Appeals simultaneously affirmed the District Court's order, No. 3662, described in the preceding footnote (RCA, 36).

REASONS FOR GRANTING THE WRIT.

A. The importance of the case and need for review.

This is the largest railroad reorganization pending in the Federal Courts. It affects three of the country's major railroads and twenty-one smaller roads, having assets, stated in financial reports to the Interstate Commerce Commission, aggregating almost a billion dollars. The Missouri Pacific alone owns and operates more than 7,000 miles of road, and the other debtors a total of over 3,000, or an aggregate of more than 10,000 miles, serving eleven midwestern and southwestern States.

The proceedings affect scores of thousands of security holders, throughout the Nation and the world, holding securities of the respective debtors. The capital structures consist of three major hierarchies, comprising a total of 19 classes of securities, some of which are subdivided into three, four or five series. The litigation affects the control and management, as well as the thousands of employees, of these huge enterprises. It affects at least thirty-five formal parties in interest, including various secured and unsecured bondholders' groups and committees, various stockholders' committees, corporate and individual trustees, Federal and State Governments, labor organizations, corporations, institutions and individuals. In the fullest sense of the word, the proceedings affect the public interest and have attracted wide attention in the Congress[1] and the press.

Neither the 1940 nor the 1944 plan was reviewed by this Court.[2] The third attempted plan, of 1949, offers the first occasion for the Supreme Court to examine the manifold controversies herein. This plan divided the Interstate

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[1] E.g., in addition to earlier references, see S. Res. 241, 81st Cong., 1st Sess. and proceedings thereunder; also S. Res. 229, 82nd Cong., 1st Sess.

[2] A collateral issue affecting the 1944 plan, however, was reviewed by this Court in *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211 (1948).

Commerce Commission itself both as to its basic legality and propriety and as to some of its details (LII, 28630-6, 28685-6).[3]

The Congress and the President for some years have been concerned with the administration of Section 77 and with the forfeitures decreed therein. As administered by the Commission and Courts the Act has been found wanting. It has involved complex solutions to relatively simple problems and drastic measures to overcome limited difficulties. It has involved protracted litigation and long lapses of time between formulation and confirmation of plans. Above all, perhaps, the administration of the Act has been criticized as being unrealistic, in the face of changing conditions, and inflexible.[4] In 1948 a new piece of legislation, Section 208 of the Bankruptcy Act, was enacted to help meet some of the problems.[5] The policies and procedures of this new law, never before invoked or interpreted, arise to be honored or dishonored, effectuated or emasculated, in the case at bar.

The plan decrees irrevocable forfeitures. Unless such grave results are compelled by the facts and applicable statutes beyond a reasonable doubt, every power in law and equity should be exerted to avert them.

In addition to the foregoing general reasons, there are many particular reasons, with reference to the numbered questions presented above, for granting the writ requested.

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[3] Three members (Commissioners Splawn, Alldredge and Aitchison) dissented. Commissioner Cross did not participate. Of the 7-member majority in the Fourth Supplemental Report of August 2, 1949 one member, Commissioner Miller, died on December 24, 1949, before the Fifth Supplemental Report and Order was made. Thus the plan was certified on the basis of a 6-to-3 approval.

[4] E.g., see Sen. Rep. 925, 79th Cong., 2nd Sess.; Sen. Rep. 1170, 79th Cong., 2nd Sess.; House Rep. 923, 80th Cong., 1st Sess.; President's Memorandum, Aug. 13, 1946, on S. 1253, 79th Cong., 2nd Sess.

[5] See Sen. Rep. 897, 80th Cong., 2nd Sess., accompanying the bill.

1. The Court of Appeals had no power to approve the plan.

The question here involves the scope, purpose and effect of the statutory injunction contained in Section 208(a)(5) of the Bankruptcy Act, the new law approved April 9, 1948. In this aspect the case is one of first impression.

Until July 13, 1951, when a petition was filed, requesting determination by the Commission of changed conditions affecting the 1949 plan herein, the statute had never before been invoked or applied. Upon the filing of such a petition, Section 208(a)(5) suspends all further proceedings for confirmation of the old plan, pending the outcome of the Commission's review. Yet the Court below proceeded on August 14, 1951, to enter its opinion and judgment, approving the old plan.

The Courts have had no previous occasion to interpret the injunctive and other provisions of the new law, which affect and will affect huge railroad properties, and their many thousands of security holders, in reorganizations under Section 77.

If, after a petition is filed under Section 208(a)(1) and while the Commission is charged with determining changed conditions affecting the old plan, the Courts nevertheless retain power to further the old plan, or add judicial sanction thereto, the quality and effectiveness of the Commission's review will be grossly impaired. The administration of the new law will limp or altogether fail, and reorganization procedures, instead of being corrected, will be more than ever confounded. The very purpose of the legislation to remedy the faults under Section 77 will be defeated and the act of Congress flouted.

These problems are novel, substantial and important. They should receive a definitive Supreme Court adjudication. A basic preliminary problem, however, is inherently involved, which is the subject of the motion attached to this petition.

2. The Commission had no power to impose the consolidation.

The question here has never been squarely adjudicated. So far as the Supreme Court is concerned, the case in this aspect also is one of first impression. To the extent that the Commission and other Courts have adverted to the matter, the issue has divided them.

The question basically is whether Section 77 of the Bankruptcy Act enlarged the powers of the Interstate Commerce Commission over railroad consolidations beyond those conferred by Section 5 of the Interstate Commerce Act. Or, more precisely: Under Section 77(f), has the Commission power to impose an involuntary consolidation, without provision for compliance with Section 5(2) of the Interstate Commerce Act?

Section 5 of the Interstate Commerce Act, historically and actually the governing statute on railroad consolidations, provides for consolidations on a *voluntary* basis only. Moreover, it prescribes special and unique proceedings and requirements for this purpose. For example, the proceedings must be initiated by an *application of the carriers* seeking authority to be consolidated. They must show *assent to the transaction by at least a majority of their respective stockholders* at a regular or special meeting called for such purpose. The Commission *must consider* the effect upon the public interest of the inclusion, or failure to include, *other railroads in the territory*. In the case at bar, none of these things was done (R II, 796-7).[6] These procedures and requirements of Section 5(2) were ignored, violated, flouted.

Section 77 of the Bankruptcy Act itself affirms and preserves the primacy of Section 5 in the field of railroad consolidation. Section 77(f) specifically enjoins the Commission to grant only such authority for a consolidation or

[6] Far from assenting, the stockholders of the respective debtors, insofar as they are represented in this proceeding, have all actively objected to the plan (R II, 513-39, 541-59).

merger of the debtor's property as may be "not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended." This clause, with obvious reference to Section 5, is sometimes called the "consistency clause".

The legislative history, intent and relationship of the two Acts, as well as their plain language, spell out a clear limitation upon the Commission's powers in Section 77 proceedings as regards consolidation.[7] No consolidation, involuntary or inconsistent with the provisions and purposes of Section 5 of the Interstate Commerce Act, is authorized by either statute. Here the Commission went beyond its powers and violated both.

The only relevant reference by the Supreme Court to the relationship of the two Acts was not focused on the consistency clause of Section 77(f) and occurred in a case which concerned an altogether different problem.

Callaway v. *Benton*, 336 U. S. 132 (1949)

Nor have the Courts of Appeals determined the precise issue. Their rulings and language offer no clear guide.

In re Chicago, Rock Island & Pac. Ry. Co., 168 F. 2nd 587 (7th Circuit, 1948); cert. denied 335 U. S. 855

In re Florida East Coast Railway Co. (*sub nomine Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*) 179 F. 2nd 538 (5th Circuit, 1950); cert. denied 339 U. S. 929[8]

The *Rock Island* case turned on the question of laches. Its language on statutory powers over consolidations was unessential to the decision and was made without benefit of briefing on the legislative history referred to above.

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[7] For a brief summary of these matters, see R II, 1064-80.

[8] Neither the petition for writ nor the oppositions raised the question of statutory power to compel the merger prescribed by the Commission in that case.

In the *Florida East Coast* case, the plan required the consolidation or merger of the debtor with an unaffiliated non-debtor road over the objections of holders of a majority of the mortgage bonds, who claimed equitable ownership of the debtor. Circuit Judge Sibley sat as Judge Designate in the District Court. He held that the consistency clause of Section 77(f) applies throughout Section 77 and that the compelled merger was not authorized by the permissive language of Section 77(b).

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by *permitting* a merger to be part of a plan." (*In re Florida East Coast Railway Co.*, 81 F. Supp. 926, D.C.S.D., Florida, 1949)

The Court of Appeals, Fifth Circuit, by a 2-to-1 vote, affirmed the rejection of the plan, but each of the Judges wrote an individual opinion. Circuit Judge Hutcheson affirmed on the ground that the plan was inequitable, but disagreed with Circuit Judge Sibley below on the question of statutory construction. Circuit Judge Russell affirmed, however, on all grounds given below; while Circuit Judge Holmes dissented. Thus, of the four Circuit Judges who considered the question of statutory power to require the merger prescribed by the Commission in that case, two found that the Commission does not have the power, and two found to the contrary. None of them even mentioned the earlier *dicta* in the *Callaway* and *Rock Island* cases as offering any guide whatever in the matter.

In the case at bar, however, the Court of Appeals relied on these cases as upholding the Commission's power to impose the consolidation here prescribed. The opinion contains no statement or analysis of the precise issue presented by the petitioners. It makes no reference whatever to the consistency clause of Section 77(f), which is the very crux of the matter. Moreover, the Court apparently confused this narrow question with some sort of unrelated

issue sought to be raised by the State of Texas (RCA, 23-4).

As noted above, the Commission itself is divided here as to the legality of the consolidation. Commissioner Splawn,[9] one of the three dissenting members, stated:

> "In presenting a plan of this nature, the majority undertakes to accomplish a result which we have no authority, on our own initiative, to bring about under section 5 of the act." (LII, 28631, 28685)

The division and confusion that has attended the disposition of this basic issue, its importance, here and in similar proceedings, involving administrative and judicial powers under two fundamental pieces of Federal railroad legislation, and the absence of any previous clear-cut adjudication demand a definitive analysis and ruling by the Supreme Court.

If the posture of the case permits, after disposition of the attached motion, such a ruling would be vital to the ultimate solution of the long-standing reorganization problems herein. For, if the 1949 plan is returned to the Commission for reconsideration and revision, the Commission and the parties should have the benefit of this Court's ruling as to whether the basic structure provided for in three attempted plans is suitable and lawful for a fourth attempt.[1]

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[9] Commissioner Splawn favors, as do the Independent Directors, the separate reorganization of each of the principal debtors in a manner that would preserve the pre-bankruptcy pattern of intercorporate relations. He believes this approach would: a) avoid the basic problem of illegality; b) simplify the problems of reorganization and equitable distributions; c) permit more satisfactory disposition of claims of security holders, including the stockholders; d) avoid any necessity of reorganizing the NOTM; e) involve no material loss of economies through consolidated operations; and f) avoid the issue raised by the State of Texas (L II, 28630-3, 28685).

[1] It may be noted that, if the District Court had disposed of this issue through the procedures sought in the Independent Directors' petition, referred to in preceding footnotes, the issue might have been so determined more than a year ago.

3. The provisions for control of the new company offend statutory standards and public policy.

The provisions of the 1949 plan are so contrived as to vest control of these vast railroad properties in a group of banks and insurance companies, already among the most powerful financial institutions of the country, despite the fact that their beneficial ownership of the properties is comparatively negligible (LII, 28607-12, 28753-4).

The overwhelming majority of the 15-man board of directors of the proposed new company, with assets of about a billion dollars, are to be selected by the following or their representatives:

	Title	Beneficial ownership of record in these proceedings
Metropolitan Life Ins. Co. The Prudential Life Ins. Co. Insurance Co. of North America New England Mutual Life Ins. Co. Provident Mutual Life Ins. Co. The Mutual Benefit Life Ins. Co. First Nat. Bank of the City of N. Y.	Group of Institutional Investors	Collectively about 9% (less than 22 million principal amount) of Mo. Pac. First & Refunding Mortgage Issue.
Manufacturers Trust Co.	Trustee for Mo. Pac. First & Ref. Issue[2]	None.
City Bank Farmers Trust Co.	Trustee for I-GN First Mortgage Issue[2]	None.
Empire Trust Co.	Trustee for Mo. Pac. Gen. Mortgage Issue[2]	None.
Chemical Bank & Trust Co.	Trustee for Mo. Pac. Secured 5¼% Issue[2]	None.
Bankers Trust Co.	Trustee for Mo. Pac. Convertible 5½% Issue[2]	None.

These banks and insurance companies are not strangers to one another. Most of them have been able to work in harmony throughout most of these proceedings. They

[2] The indenture would be scrapped upon reorganization. Whether the bank would have even a fiduciary role thereafter is uncertain.

have contributed more than any other parties to the formulation and support of all the attempted plans promulgated by the Commission in this case.

The plan contains devices that would tend to perpetuate their control of the whole billion-dollar enterprise, with all the social, economic and political power it commands. The real owners, that is, the future stockholders, would have a hard time gaining even minority representation, let alone control of their property. The terms of office are so staggered that only five members of the board would come up for election in any one year. Even with cumulative voting (by which Independent Directors are now elected), it would require holdings of at least 1/5 of the entire stock represented at a meeting to elect a single representative. Such holdings today can elect 1/5 of the board, or three directors. Under the plan, holders of a 3/5 majority of the stock voting, with consistent cohesion and persistent effort, would require three years to gain representation of their own choosing commensurate with their interests (LII, 28611-12, 28741, 28753-4).

The purpose of these arrangements, according to the Commission, is "to insure a degree of stability of management in the early years" (LII, 28611). But such provisions accomplish little to assure effective direction of the company's affairs by the lawful owners, whose customary, inherent and democratic right to elect annually an entire board of directors of their own choice is whittled here to the vanishing point. The control provided for here would be virtually unbreakable.

Whether arrangements as bold as these to secure control indefinitely of a vast railroad agglomerate for a group of banks and insurance companies, handling other people's money, meet the legal and equitable standards of Section 77 has never been authoritatively adjudicated by this Court. Whether a decree by an agency of the Federal Government creating such control is consistent with public policy has likewise never been determined by this Court. The Courts below scarcely adverted to the matter.

These questions are worthy of a most searching and thoughtful review.

4. The Commission disregarded actual earnings and val ns.

Section 77(e) requires that valuations by the Commission be "determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts."

The actual earning record over the 12-year period, 1937-1948, the latest data before the Commission, showed as follows (LII, 28542):

	Missouri Pacific	Debtors Combined
Average annual earnings available for interest after Federal income taxes	$24,550,151	$31,438,502

The Commission disregarded these cold facts, and determined earning power on the basis of a forecast, with certain adjustments, of a "future normal year's earnings", which had been prepared more than a decade earlier, in 1936, by persons then employed by the Trustee in Bankruptcy. On this constructive and already discredited basis, the Commission came up with earning power figures that seem, as indeed they are, derived from some wholly imaginary operations. These figments, on which the plan and forfeitures are predicated, were 5½ million dollars short of reality in the case of the Missouri Pacific and almost 6 million dollars short for the debtors combined (LII, 28533-47):

	Missouri Pacific	Debtors Combined
I.C.C. estimate of a "future normal year's earnings available for interest after Federal income taxes"	$19,000,000	$25,450,000

This Court's previous decisions have indicated the considerable latitude of discretion enjoyed by the Commission, as the expert body delegated by Congress, to determine railroad capitalization under Section 77(e).

Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943)

Group of Institutional Investors v. *Chicago, Milwaukee, St. P. & Pac. R. Co.*, 318 U. S. 523 (1943)

But no Supreme Court case to date lays down the effective negative counterparts of these decisions, without which the true ambit and limits of the Commission's discretion remain uncharted. What the proper administration of Section 77 needs today and for the future (and this checkered case affords a prime opportunity therefor) is an articulated ruling by this Court that the Commission's discretion is not a license to disregard the simple arithmetic of past and present earnings.

In computing physical values, the Commission again employed a dusty artifact in preference to the actual financial records maintained in accordance with I. C. C. accounting regulations. The actual book value of Missouri Pacific assets, after substantial write-offs and tremendous gross capital expenditures during bankruptcy, was conservatively stated as of December 31, 1947, at more than $696,500,000 (LII, 28564). The Commission ignored these facts, however, in favor of a theoretical report by its Bureau of Valuation, made as of December 31, 1945, with certain adjustments. On this basis, and taking account of investments and other items, the Commission majority found reproduction cost less depreciation, in the case of the Missouri Pacific, would equal only about $602,000,000 (LII, 28510-13, 28553-64).

Even such grossly understated values were treated by the Commission in incomprehensible and inconsistent ways. In determining maximum permissible capitalizations for the principal debtors, considered separately, the Commission gave decisive weight to such values in the case of the NOTM (LII, 28561, 28658), but gave no apparent weight whatever thereto in the case of the Missouri Pacific (LII, 28563-4).

The opinions of the Courts below provide little more than a routine ratification of the foregoing erroneous, inconsistent and arbitrary determinations. A Supreme Court review is sorely needed to define further, and enforce adherence to, the statutory standards of Section 77.

5. No provision has been made to use cash with maximum effectiveness.

At the end of 1948, the debtor estates had cash and cash equivalents in excess of liberal working funds, as follows:

	Missouri Pacific	Debtors Combined
Cash and cash equivalents	$72,153,834	$90,566,144
Working capital	20,000,000	25,000,000
Excess	$52,153,834	$65,566,144

As shown in the next section, these surplus funds, though huge, have since been growing apace.

One of the objectives of the new law, Section 208 of the Bankruptcy Act, passed in 1948, was to avoid drastic reorganizations and achieve simpler business-like solutions by putting such excess cash accumulations to the most effective possible use, to wit, the prompt reduction of existing debt at a discount and the elimination of further interest accruals thereon (see p. 8 above).

Section 208(b) requires the Commission to take into account specifically:

> " • • • *cash* and net current assets, retirements and purchases of debt, including retirements and *purchases at a discount* that have been made or *that can reasonably be made,* • • • ." (Emphasis supplied).

This is not the casual language of ordinary enumeration. It reflects intimate knowledge of the crux of many railroad reorganization problems. The words were taken almost verbatim from an earlier bill, S. 1253, 79th Cong., 2nd Sess. The Senate Report on the earlier bill in 1946 is

therefore especially pertinent. That report, after a most impressive study, stated:

> "The primary problem of those in control of railroads during the last half-dozen years, and the primary problem at the present time, is, insofar as railroad finances are concerned, the prompt reduction of debt at a discount." (Sen. Rep. 1170, 79th Cong., 2nd Sess., p. 159)

Against the background of Congressional criticism which produced the new legislation, the language of Section 208(b) quoted above is an enunciation of national policy to provide for the use of surplus cash in railroad estates to purchase debt at a discount.

In the case at bar, the 1944 plan was returned to the Commission in 1947, because of changed conditions. The remand was not accomplished through Section 208(a)(1), which was still pending before the Congress, but the effect was identical. The new measure became the law of the land on April 9, 1948, with the express approval of the Interstate Commerce Commission.[8]

But more than a year later, on August 2, 1949, when the I.C.C. report in this case was issued, the Commission disregarded, and made no provision whatever to apply, the new reorganization principle. The I.C.C. report does not even mention the matter. Efforts by the petitioners to obtain provision for the immediate effective use of surplus cash were buried by the Commission in a general rejection of almost all their proposals.

The duty to use cash for such debt reduction is especially important, when any group of security holders, as in this case, are threatened with forfeiture, which could be avoided. After this duty had been made a matter of explicit policy in Section 208, the Commission's inaction was little short of a defiance of the will of Congress.

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[8] Sen. Rep. 897, 80th Cong., 2nd Sess., pp. 11-12.

Worse still than its inaction, the Commission in effect committed the surplus funds to indefinite idleness. The majority plan acknowledged the availability of over $35,000,000 of Missouri Pacific cash and over $4,800,000 of I-GN cash for the reduction of claims; but instead of providing that these funds be used promptly to acquire claims at available discounts, it provides that they be held until such time, if ever, as the plan may be consummated, and then applied to the reduction of certain claims taken at their full face amount (LII, App. D, opp. p. 28636).

Before the District Court, and again before the Court of Appeals, the Independent Directors persistently requested, as a claim for equitable treatment and relief under Section 77(e), the prompt use of the ever-mounting surplus cash to acquire debts at a discount. Their vital claim was virtually ignored.

The questions here are entirely novel, involving the application of policies enacted in Section 208. They are of crucial importance in the ultimate solution of these and other railroad reorganization proceedings.

If feasible, after action on the attached motion (a condition of all points urged herein) the Supreme Court should review these matters in order effectively to redirect the administration of Section 77 along the lines indicated by the Congress.

6. Changed conditions have utterly outmoded the plan.

Since the Commission's approval of the 1949 plan, national and international developments of such magnitude and impact have occurred that the plan has been rendered obsolete and more inequitable than ever.

As shown above, the actual average earnings, 1937-1948, had exceeded the figures on which the plan was predicated by about 5½ million dollars in the case of the Missouri Pacific and by about 6 million dollars for the debtors combined. The Commission plan was based on the theory that earnings would not only decline, but return perhaps to

something resembling pre-World War II figures. The very opposite has occurred.

The earnings in 1950 reduced the I.C.C. forecast to an absurdity. For the Missouri Pacific and for the debtors combined, on the basis of *existing capitalization*, 1950 earnings were at a level higher than in any year of their history, excepting only during 1942-1944:

	Missouri Pacific	Debtors combined
1950 earnings available for interest after Federal income taxes[4]	$35,928,237	$45,595,589
I.C.C. forecast on which the 1949 plan was predicated	19,000,000	25,450,000
Excess over I. C. C. forecast	$16,928,237	$20,145,589

Results for 1951 are incomplete, but total operating revenues for the first 9 months exceeded those for the ~~entire~~ same period ~~year~~ of 1950, and even with the Trustee's increasingly lavish maintenance policy, which has stepped up expenditures to an unusual degree, the earnings for the first 9 months were already about equal to those forecast by the Commission for an entire year.[4] And it is the last quarter which has usually been the period of highest earnings.

The amounts of cash and cash equivalents have likewise soared. The totals as of October 31, 1951, were as follows:

	Missouri Pacific	Debtors combined
Cash and cash equivalents[4]	$89,823,552	$104,336,048

Although they are not yet publicly available, the cash balances at the end of December, 1951, undoubtedly appear still higher. These amounts are of prime significance, especially in view of the new policy under Section 208 to use surplus cash for advantageous debt reduction. These growing funds hold the practical possi-

[4] According to an exhibit in the pending I. C. C. proceedings, prepared by the Trustee's Chief Accounting and Financial Officer.

bility of solving, in a relatively simple way, most, if not all, of the reorganization problems of the Missouri Pacific and of other railroads in the proceeding.

The physical values, according to the Commission's own Bureau of Valuation, have increased, in the case of the Missouri Pacific alone, by considerably more than $100,000,000 over the corresponding values found in the 1949 plan.[5] This increase, one of the most striking manifestations of the changes which have occurred, arises largely from the enormous sums ploughed back into the property for maintenance and improvements in recent years.[6]

With continuing huge Federal expenditures, geared to the United States' national and international commitments and policies, with business activity expanding rather than contracting, with railroad revenues mounting (increased freight rates have been allowed to meet increased costs of labor and materials), the trend is certainly not in accordance with that forecast in the 1949 plan. The new facts, even more than the facts up to the end of 1948, which were available to the Commission when the plan was promulgated, discredit the very foundations of the plan and render its terms and forfeitures more inequitable than ever.

On top of everything, the Trustee in Bankruptcy is making additions and betterments to the properties on a scale commensurate with the prospect of the continuing large volume of business.[6]

If the 1949 plan at any time had some unapparent virtue, it has wholly disappeared in the cold light of changed conditions. These developments require the return of the plan to the Commission and a new approach to the whole problem in accordance with the new statutory standards.

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[5] According to a Bureau Report in the pending I. C. C. proceedings.

[6] According to exhibits in the pending I. C. C. proceedings. According to still another, the investments alone of the Missouri Pacific have increased in value since the Commission's 1948 hearings by at least $12,000,000.

The changed conditions were disregarded by the Court below, despite the new policy on such matters embodied in Section 208.

Whereas the Supreme Court cases dealing with the Commission's discretion have ruled only affirmatively—upholding the Commission's discretion,—the cases on changed conditions have ruled only negatively. That is, only changed conditions that have *not* warranted reconsideration have been adjudicated.

> *Insurance Group Committee* v. *Denver & Rio Grande Western R. Co.*, 329 U.S. 607 (1948)
>
> *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448 (1943)
>
> *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U.S. 523 (1943)

This Court now should implement the new policy of Congress by establishing for reorganization proceedings the same type of landmark which it has plainly set in rate-making proceedings.

> *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U.S. 248 (1931)

In the absence of such an adjudication, the lower Courts may continue, as in this case, to proceed down a road marked "Confirmation", without regard to the legislative direction toward a different destination, where changed conditions have arisen. It would be salutary indeed if the Supreme Court would erect, in accordance with the intent of Section 208, a clear marker for the two-way guidance of present and future reorganization travellers.

But whether this Court has power so to act in this case is itself a most serious question. That preliminary issue is in part the subject of the attached motion.

CONCLUSION.

Subject to the matters raised in the attached motion, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioners.

January 10, 1952.

MOTION TO VACATE FORTHWITH THE OPINION AND JUDGMENT BELOW, TO DEFER CONSIDERATION OF ALL PETITIONS FOR WRITS WITH RESPECT THERETO AND FOR OTHER RELIEF.

1. On July 13, 1951, while the appeals were pending before the Court of Appeals, several parties filed in the District Court (where proceedings to confirm the plan had already been instituted) a petition under Section 208(a)(1) of the Bankruptcy Act, requesting a hearing and report by the Interstate Commerce Commission as to any changes, facts or developments since the Commission's approval of the plan, which were not provided for therein and which would warrant its reexamination, reconsideration or revision. On the same day, July 13, 1951, in accordance with the first sentence of Section 208(a)(5), the District Court entered an order, referring the petition to the I.C.C.

2. The second sentence of Section 208(a)(5) provides:

> "(a) *Notwithstanding any other provision of law*—
>
> • • • • • • • •
>
> (5) • • • Upon the filing of such petition with the court *all further proceedings for confirmation of the plan shall be suspended* pending disposition of the petition by the Commission and certification of its action thereon to the court." (Emphasis supplied)

3. Following, for convenient reference, is a timetable of the critical events involved herein:

October 3, 1950—Order entered by District Court, approving old plan.

May 10, 1951—Arguments heard by Court of Appeals on appeals from District Court's approval order.

June 25-28, 1951—Hearings held by District Court in proceedings to confirm old plan.

July 13, 1951—Petition filed in District Court under Section 208 to obtain I.C.C. determination of changed conditions affecting old plan.

July 13, 1951—Order entered by District Court referring 208 petition to I.C.C.

July 25, 1951—Order entered by I.C.C., fixing September 15, 1951 as date for filing replies to 208 petition.

August 14, 1951—Opinion and judgment entered by Court of Appeals, affirming approval of old plan.

September 15, 1951—Replies to 208 petition filed in I.C.C.

October 18, 1951—Petition filed in Supreme Court to extend time for filing petition for writ, in view of statutory suspension under Section 208(a)(5) and pendency of I.C.C. proceedings on changed conditions.

October 19, 1951—Motion filed in Court of Appeals to vacate its opinion and judgment in view of statutory suspension of proceedings as directed in Section 208 (a)(5).

October 20, 1951—Order entered by Mr. Justice Clark, extending time for filing petition for writ until January 11, 1952.

Nov. 27-Dec. 3, 1951—Hearings held by I.C.C. to determine changed conditions affecting old plan. Briefs thereon ordered to be filed by January 28, 1952.

4. On August 14, 1951, more than a month after the statutory injunction of Section 208(a)(5) had become effective, and while the petition under Section 208(a)(1) was pending, as it still is, before the Commission, the Court of Appeals nevertheless issued its opinion and entered judgment, affirming the District Court's approval of the 1949 plan.

5. The statutory injunction of Section 208(a)(5) suspended the proceedings in the Court of Appeals on July 13, 1951. Thereafter the Court was, and is, without power or jurisdiction to proceed further, until the Interstate Commerce Commission disposes of, and certifies its action on, the 208 petition. Decisions, judgments and actions of

any kind herein by the Courts to approve, ratify, further, or in any way confirm the old plan, at the very time when the Commission is considering the impact of changed conditions thereon, were on July 13 and still are suspended by operation of law. The decision below should never have been entered. Having been entered, perhaps in ignorance of the petition, it should have been vacated by the Court of Appeals itself, when the Court was first informed of the petition. Not having been so set aside, the opinion and judgment below should be vacated forthwith by order of this Court.

6. The whole content and purpose of Section 208 is to place upon the Interstate Commerce Commission the duty to review in the light of changed conditions any plan of reorganization that it has previously approved, where more than 18 months have elapsed since such approval.

Congressional Committees concerned with these matters had for a number of years been alarmed by the forfeiture of junior bondholders' and stockholders' interests, wiped out or threatened with being wiped out under Commission plans that had actually become outmoded by the time they were later posed for ratification in the District or appellate Courts.[1] Yet the Commission had felt that it lacked power, once it promulgated a plan, to volunteer to the Courts its view as to the effect of later developments upon the plan and its propriety.[2] Section 208, enacted April 9, 1948, was formulated and passed to meet these problems.[3]

7. Section 208(a)(1) provides:

> "* * * *it shall be the duty of the Commission*, upon petition of any party to the proceeding filed at any time

[1] E.g., see Sen. Rep. 925, 79th Cong., 2nd Sess., pp. 64-73; Sen. Rep. 1170, 79th Cong., 2nd Sess., pp. 8-21, 43-9; House Rep. 923, 80th Cong., 1st Sess., pp. 2, 8-9.

[2] E.g., see Sen. Rep. 925, supra, pp. 69-70; Sen. Rep. 1170, supra, pp. 61-2; House Rep. 923, supra, pp. 7-8.

[3] E.g., see Sen. Rep. 897, 80th Cong., 2nd Sess.; Conference Rep. 1603, 80th Cong., 2nd Sess.

more than eighteen months after certification by the Commission to the court of the plan * * *, to report to the court * * * any changes, facts or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to re-examine or reconsider and, if necessary, to revise such plan * * *." (Emphasis supplied)

The purpose of this legislation is plainly stated in the report of the Senate Committee in charge of the measure:

> "But even more important, the recommended legislation would, for the first time, correct a situation which has heretofore prevented reconsideration of a reorganization plan years after it first had been promulgated. It does this by *placing the duty upon the Commission*, under prescribed conditions and circumstances, of reporting current facts and conditions surrounding a railroad which might alter or affect provisions of a reorganization plan prepared years before." (Sen. Rep. 897, 80th Cong., 2nd Sess., p. 2) (Emphasis supplied)

And again:

> "The Committee believes that the law should be clarified and the duty of the Commission made plain." (p. 7)

8. Assigning to the Commission the duty of determining changed conditions and their impact on the old plan, the Act deliberately imposes corresponding restraints upon the Courts. Until the Commission completes its assigned task, the law directs that "*all further proceedings* for confirmation of the plan shall be suspended." This injunction is ironclad. It is locked and double-bolted, "notwithstanding any other provision of law."

Congress thus insured that the *status quo* of the reorganization proceedings in the Courts would be preserved, while the Commission performs its statutory responsibilities. It prohibits any proceeding that would further, or add one jot of judicial sanction to, the old plan, while the Commission

is charged with reviewing that plan in the light of changed conditions.

The injunctive language employed is plain and broad enough to safeguard the Commission and the security holders against any judicial action whatever that might restrict, impair or even influence the free, unfettered performance of the Commission's prescribed duty.

9. It has been contended by the respondents that only proceedings technically designated "for confirmation" are suspended by the new law. Such a narrow interpretation, however, would defeat the whole substance and purpose of the Act. If this legislation is to have effect and not to be rendered futile, its terms must be honored according to their plain meaning that nothing may be done in the Courts which would hamper, interfere with or circumscribe the Commission's deliberations. To add judicial approval to the old plan, while the Commission is in the very act of determining changed conditions and their effect on that plan, flouts the law of Congress. Where, as in this case, issues on changed conditions have also been posed before the Courts, the attempted procedure would, in regard to such questions, open the door to inharmonious or even rival action simultaneously by Court and Commission.

Section 208 was not intended to permit any such unseemly spectacle of disorderly administration, but rather, in the words of the Senate Committee report, "to remedy this lack of liaison between courts and the Commission." As emphasized by the legislators: "The Committee does not intend that the plan shall become a football between the Commission and the Courts." (Sen. Rep. 897, 80th Cong., 2nd Sess., pp. 7, 8)

10. The legislative history of Section 208(a)(5) leaves no doubt about the scope of its injunction. Reports in both Houses used identical language to describe the procedural and jurisdictional consequences upon the filing of a petition under Section 208 with the Court:

"Such action apprises the court of the legal action taken under the new law and suspends *further action* by the court *involving confirmation* of the old reorganization plan." (Sen. Rep. 897, supra, p. 8; also Conference Rep. 1603, 80th Cong., 2nd Sess., p. 4) (Emphasis supplied)

11. It may be that the Court of Appeals was not promptly informed of the filing of the petition in this case.[4] Since the old plan was pending on July 13, 1951, in both the District and appellate Court, it would seem to have been proper for the petitioners under 208, or the District Court, officially to notify the Court of Appeals at once. If absence of official notice excused the Court of Appeals as late as August 14, 1951, however, the excuse vanished on October 19, 1951, when the Missouri Pacific filed a formal motion to vacate the opinion and judgment. Almost three months have passed, so far as the undersigned is informed, without action on that motion.

12. Every day that the opinion and judgment stand, they prejudice or threaten to prejudice the Commission's considerations. An appellate Federal Court decision, although improperly made, can hardly be altogether overlooked even by an expert administrative agency. The Commission task is arduous and trying enough,[5] without adding the stone of judicial prestige upon one side or another

---

[4] Through a motion to postpone the argument below (RCA, 9), based largely on the ground that such a petition would be filed in or about July, 1951, and through references in oral arguments to the protection afforded by Section 208 as to changed conditions, the Court was aware that the filing of such a petition at the expiration of the 18-month statutory period was an imminent likelihood. The Court undoubtedly had informal notice of the petition through widespread press reports at the time it was filed, if not otherwise.

[5] The Commission has held hearings on the petition for six days and two nights, Nov. 27-Dec. 3, 1951, received 175 exhibits and testimony covering 1,262 pages. Briefs have been ordered filed Jan. 28, 1952, to be followed by an Examiner's Proposed Report, as to which the parties may file exceptions and perhaps make oral argument. Much is at stake in the Commission proceedings.

of its deliberations. Some damage to the Commission's assignment has undoubtedly already been done by the Court of Appeals decision. Such damage can be offset, if at all, only by wiping the decision off the books in a way that will leave the Commission path utterly cleared of prejudicial impediments. The protracted failure of the Court of Appeals to set aside the decision imposes upon this Court the duty to do so without more ado.

13. The same law that suspended proceedings in the Court of Appeals suspends also proceedings in this Court, except presumably to correct the improper exercise of power below. If this Court vacates the opinion and judgment of August 14, 1951, that would be, for the time being at least, an end of the matter—and a proper end. If this Court prefers to wait longer for the Court of Appeals to correct its own error, that would be less salutary, but perhaps not fatal. In any case, this Court should defer consideration of all petitions for writs relating to the judgment below, in deference to the statutory injunction and the pending Commission proceedings. It is possible that such proceedings may render some or all of the questions presented by the various petitioners moot.

WHEREFORE, the petitioners herein respectfully pray that this Court enter an order or orders:

a. Directing the Court of Appeals forthwith to vacate its opinion and judgment entered August 14, 1951; or

b. Deferring action on this motion until such time as the Court of Appeals acts upon the motion heretofore, on or about October 19, 1951, made by the Debtor to vacate said opinion and judgment; and

c. In any event, deferring consideration of all petitions for writs of certiorari with respect to the Court of Appeals judgment of August 14, 1951, pending disposition by the Interstate Commerce Commission of the petition heretofore, on July 13, 1951, filed under Section 208(a)(1) of

the Bankruptcy Act and further pending certification by the Commission of its action on said petition to the appropriate Court.

d. Granting such other and further relief as may be just and equitable.

Respectfully submitted,

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January 10, 1952.

Office - Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 527.

JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company,

Petitioners,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

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Dated: New York, N. Y., February 7, 1952.

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Missouri Pacific Railroad Company Reorganization, 275 I. C. C. 59, 203 (1949) 2

Statutes:

28 U. S. C. §1254(1) 2, 5

Bankruptcy Act §77(c)(13), 11 U. S. C. §205(c)(13) 2, 5

Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 527.

JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company,

Petitioners,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832. The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported at 191 F. 2d 265 (8 Cir. 1951). The Fourth and Fifth Supplemental Reports

* A list of abbreviations and references used in this brief is on page ii, *supra*.

of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). Respondent submits that petitioners are not parties and therefore this petition should be dismissed for that reason.

Questions Presented.

1. Whether this petition should be dismissed because Petitioners are merely three individuals, minority members of the board of fifteen (15) directors of one of the Debtors and have been denied leave to intervene in this reorganization proceeding before the District Court.

This is the only question raised by this petition which is not presented by some of the other four petitions of actual parties requesting a review of the decision of the United States Court of Appeals for the Eighth Circuit affirming the approval of the Plan of Reorganization of the Missouri Pacific Railroad System.*

2. Whether the District Court performed the duties imposed upon it by Section 77(e) of the Bankruptcy Act, 11 U. S. C. §205, when it approved the Plan of Reorganization for the Missouri Pacific System and certified to it by the Interstate Commerce Commission.

Respondent respectfully refers this Court to its brief in No. 525, *Alleghany Corporation* v. *Group of Institutional Investors etc.*, for its argument on this question.

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* Nos. 524, 525, 526 and 528 (October Term, 1951).

3. Whether the Interstate Commerce Commission, acting under Section 77 of the Bankruptcy Act, 11 U. S. C. §205, has the power to provide in a plan of reorganization for the merger or consolidation of the three principal debtors into one corporation where one of the debtors owns about 95% of the capital stock of the second which in turn owns all the capital stock of the third, and the three have been operated on a unified basis for the last 28 years.

Respondent respectfully refers this Court to its brief in No. 526, *Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee* v. *Group of Institutional Investors, et al.*, for its argument on this question.

4. Whether the filing of a petition with the District Court pursuant to 11 U. S. C. §208(a)(1) which suspends "all further proceedings for confirmation of the plan" also suspends the proceedings for approval of a plan of reorganization.

Petitioner has also raised this question in the form of a "motion to vacate forthwith the opinion and judgment below, to defer consideration of all petitions for writs with respect thereto and for other relief" (Petition, pp. 25-32). Respondent respectfully refers this Court to its brief in No. 528, *Missouri Pacific Railroad Company* v. *Group of Institutional Investors etc.*, for its argument on this question.

Statement.

This statement will be limited to facts pertinent to question No. 1—whether this petition should be dismissed because petitioners are merely a minority of the Board of Directors of one of the Debtors and have been denied leave

to intervene in this reorganization proceeding before the District Court.

Petitioners are three of fifteen members of the Board of Directors of one of the Debtors, the Missouri Pacific Railroad Company (hereafter called MOP). The majority of the Board has not authorized these three to take any action with respect to these reorganization proceedings. In fact, MOP is separately represented in these proceedings and has petitioned this Court for a writ of certiorari (October Term 1951, No. 528). The Petitions of MOP and others who are properly parties in this case present all the questions which this minority of MOP's Board of Directors present in their Petition.

In 1947 the so-called "Independent Directors" were granted permission by the Interstate Commerce Commission to intervene in the proceedings before the Commission, but they have never been granted leave by the District Court to intervene generally, or as individuals, or as a group pursuant to Rule 24 of the Federal Rules of Civil Procedure. On the contrary, on February 24, 1948, they petitioned the District Court for permission to intervene in these proceedings. A copy of that petition is annexed hereto as Appendix A. On April 9, 1948, the following entry was made in the District Court's docket:

> "Separate petition of John V. Farwell III *et al*, Independent Directors of Missouri Pacific R. R. Co., and Mord Bogie, *et al*, constituting a Protective Committee for holders of Missouri Pacific R. R. Co. 5½% Secured Serial Bonds, for leave to intervene, argued, submitted and said separate petitions denied."

The District Court has not taken any action modifying this order of April 9, 1948, which denied the "Independent Directors" leave to intervene.

Argument.

Petitioners invoked the jurisdiction of this Court only under 28 U. S. C. §1254 (1). That section provides that:

> "Cases in the courts of appeals may be reviewed . . . (1) by writ of certiorari granted upon the petition of any party. . . ."

Petitioners were never admitted as parties to the proceedings for approval of the Plan in the District Court. There is nothing in the Bankruptcy Act which gives a single director or a group of three minority directors any right to participate as a party in a reorganization proceeding. Section 77(c) (13), 11 U. S. C. §205 (c) (13) gives a "right to be heard on all questions arising in the proceedings" to

> "The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding."

Individual directors, independent or otherwise, do not fall into any of these categories.

As Petitioners are not parties, they are not entitled to invoke the jurisdiction of this Court under Section 1254(1). Cf. *Ex Parte In the Matter of Leaf Tobacco Board of Trade of the City of New York*, 222 U. S. 578 (1911); *Louisiana* v. *Jack*, 244 U. S. 397 (1917); *In re Van Sweringen Corporation*, 180 F. 2d 119 (6 Cir. 1950); *In re Phoenix Dress Co.*, 131 F. 2d 726 (7 Cir. 1942).

Conclusion.

It is respectfully submitted that this Petition for Writ of Certiorari should be dismissed or denied.

Respectfully submitted,

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

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Of Counsel.

Dated: New York, N. Y., February 7, 1952.

Appendix A.

IN THE

DISTRICT COURT OF THE UNITED STATES,

EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

IN THE MATTER
of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor.

PETITION TO INTERVENE.*

Come now John V. Farwell, III, Bolton Sullivan and Donald D. Wilson, through their attorneys, Lucien Hilmer and John F. Davis, and respectfully petition this court that they be permitted to intervene as parties in the above entitled proceeding. In support thereof they respectfully show:

1. John V. Farwell, III, Bolton Sullivan and Donald D. Wilson are directors of the Debtor, Missouri Pacific Railroad Company, having been last elected by the stockholders at the annual meeting held on May 13, 1947.

2. On October 24, 1947 said John V. Farwell, III, Bolton Sullivan and Donald D. Wilson were, by order of the Interstate Commerce Commission, permitted to intervene as parties in the reorganization proceedings of the Missouri Pacific Railroad Company pending before said Commission. On January 17, 1948 petitioners filed with the Interstate Commerce Commission on the Clerk of the United States

* Denied April 9, 1948.

District Court, Eastern Judicial District of Missouri, a plan of Reorganization for Missouri Pacific Railroad Company, New Orleans Texas & Mexico Railway Company and International-Great Northern Railroad Company.

3. The provisions of Section 77 of the Bankruptcy Act respecting reorganization of railroad companies require proceedings in the District Court as well as before the Interstate Commerce Commission. Moreover, this court considers and acts on various matters in the administration of the several estates which have an important bearing on any proposals made for reorganization.

WHEREFORE, your petitioners pray:

a. That your petitioners be permitted to intervene generally in this proceeding and become parties thereto;

b. That your petitioners have such other and further relief as may be just and proper.

Respectfully submitted,

JOHN V. FARWELL, III,
BOLTON SULLIVAN,
DONALD D. WILSON,
Petitioners,

By their counsel:

/s/ LUCIEN HILMER,
LUCIEN HILMER,

/s/ JOHN F. DAVIS,
JOHN F. DAVIS,

HILMER AND DAVIS,
1700 I Street, N. W.,
Washington 6, D. C.

February 24, 1948.

(Verification omitted.)